Overseas Students OMBUDSMAN

Submission by the Overseas Students Ombudsman

REFORM OF THE ESOS FRAMEWORK

Submission by the Acting Overseas Students Ombudsman, Richard Glenn

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Introduction and summary

The Overseas Students Ombudsman is a statutorily independent, external complaints and appeals body for overseas students and private registered education providers. The Overseas Students Ombudsman commenced operations in April 2011.

The Overseas Students Ombudsman:

- Investigates individual complaints about the actions or decisions of a private-registered education provider in connection with an intending, current or former overseas student;
- Works with private-registered education providers to promote best-practice handling of overseas students' complaints, and;
- Reports on trends and broader issues that arise from complaint investigations.

In addition to our Overseas Students Ombudsman role, we also investigate complaints from domestic and overseas students about the Australian National University (ANU) (under our Commonwealth Ombudsman jurisdiction), and the University of Canberra (UC) and the Canberra Institute of Technology (CIT) (under our ACT Ombudsman jurisdiction).

In the last three years, the Overseas Students Ombudsman has received more than 1,850 complaints from overseas students originating from over 65 countries about more than a third of the 975 private registered providers in our jurisdiction[1].

We focus on achieving practical remedies where a student has been adversely affected by a provider's incorrect actions. We also uphold complaints in support of the provider where the provider has followed the *Education Service for Overseas Students Act 2000* (ESOS Act), the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code) and its own policies and procedures. Where there has been fault on both sides, we negotiate an appropriate resolution.

The most common complaints to the Overseas Students Ombudsman are:

- Refund complaints and fee disputes
- External appeals about providers refusing to release a student so that they can transfer to another provider under standard 7 of the National Code
- External appeals against the decisions of providers to report students to the Department of Immigration and Border Protection (DIBP) for unsatisfactory attendance under standard 11 or course progress under standard 10 of the National Code.

The ESOS framework informs the decisions we make about whether to investigate a complaint and whether to recommend preventative and/or remedial action. Our comments on the proposed changes to the ESOS framework are informed by our experience in investigating complaints and working with hundreds of private registered education providers and overseas students.

We trust this submission will assist the Department in its reform of the ESOS framework and we welcome any opportunity to discuss our comments. We look forward to attending the ESOS reform stakeholder consultation sessions and contributing to the consultation on the redrafting of the National Code and explanatory guide in late 2014/early 2015.

[1] According to PRISMS data as at 1 October 2014.

Streamlining quality assurance agency processes

Simplifying administrative arrangements

We note the proposal to:

- Allow quality assurance agencies to deem compliance with ESOS standards if equivalent domestic standards are met.

We recognise the need to integrate registration and other decision making processes for both domestic and international quality assurance, to reduce the regulatory burden on education providers. However, we would be interested to know what this would mean in terms of a clear standard being publically available for the OSO to use in investigating complaints.

For example, currently we investigate providers' actions against the National Code standards. If a provider had not met the standard exactly but had been deemed by the quality assurance agency to have complied with a similar domestic standard, how would the OSO identify this? Would the quality assurance agency record in PRISMS where it has deemed a provider to have met an equivalent domestic standard?

We would need to consider the standard the provider has been deemed to have met in order to tailor our request for information from the education provider to only be what is necessary to investigate the complaint or external appeal. We support this proposed change as long as it is clear what standard the provider has met and that this information is publically available for overseas students and external complaints bodies such as the Overseas Students Ombudsman.

We look forward to discussing these issues with the Department.

Reviews of decisions by quality assurance agencies

We support the proposal to amend the ESOS Act to allow an education institution to seek an internal review of a decision made by the relevant quality assurance agency, the Australian Skills Quality Authority (ASQA) or the Tertiary Education Quality Standards Agency (TEQSA), prior to making an application for review to the Administrative Appeals Tribunal (AAT).

This proposed change is in line with best practice complaints handling principles, which support the right of applicants to lodge an internal appeal against an adverse administrative decision, before appealing to an external body.

Reducing the reporting burden

We support the proposal to streamline the student default reporting process in PRISMS to align with the 14 day reporting timeframe in s 19(1) of the ESOS Act, to allow easier reporting of student defaults through the student course variation process. From our observations of provider reports in PRISMS in refund complaints, it appears some providers have not been aware of the separate requirement in s 47C(2) to notify the Tuition Protection Service (TPS) Director of a default within 5 business days of the default occurring. A consistent 14 day timeframe would be simpler.

Minimising Tuition Protection Service requirements

We note the proposal to:

- Change the requirement that all education institutions be subject to the 50 per cent limit on the collection of tuition fees prior to commencing a course
- Remove requirements to identify study periods in the ESOS Act.

Prior to 1 July 2012, when the 50 per cent limit on the collection of tuition fees was introduced, we investigated a number of complaints where providers were seeking to retain an excessive amount of unspent tuition fees under their refund policy, due to a student default. While we do not have a view on this proposed change, we note that the intended ability of providers to receive 100 per cent of tuition fees in advance will make refund policies even more important.

It will be critical that providers include a valid refund policy in their written agreements and that the terms of those refund policies are fair and reasonable. Given refund and fee disputes are the most common type of complaints the Overseas Students Ombudsman receives, we are keen to see clear requirements set out in the ESOS framework for providers regarding the inclusion in written agreements of both a refund policy (returning fees already collected) and a cancellation fee policy (charging additional fees not yet collected). We discuss this issue further under 'Transfer of students', relating to the proposal to require providers to include a fee cancellation policy in their written agreement if they wish to pursue a student for further fees due to the student withdrawing or transferring to another provider.

We note the proposal to remove the requirement for written agreements to include study periods. We often see written agreements between registered providers and overseas students that are non-compliant with the ESOS framework because they do not include study periods or set out study periods that are greater than 24 weeks in length. We also see instances in which study periods are specified for part but not all of a course. As a result, we have had to recommend that some providers pay a refund due to these deficiencies, which have rendered their written agreements non-compliant.

We also appreciate that the requirement to include study periods presents particular challenges for many ELICOS providers who deliver English language courses on a rolling basis according to the needs of each student meaning the course length can vary depending on the student's progress.

We have also previously raised with DE the fact that the requirement in s 22 for study periods to be no more than 24 weeks in length, appears to conflict with the National Code definition of a study period as not exceeding six months. We note the s 22 requirement is related to the collection of tuition fees before course commencement, whereas the National Code definition of a study period as a term, trimester or semester, is related to the purpose of monitoring student course progress and attendance. Nevertheless, the current contradiction between these two parts of the ESOS framework is confusing.

Therefore, we do not have a view on the removal of the requirement in s 22(3) for study periods of no more than 24 weeks to be included in provider's written agreements. However, we note it is important that where a provider's refund policy or fee cancellation policy refers to a study period, of whatever length, that that study period is clearly, consistently and unambiguously defined, either in the refund or fee cancellation policy or elsewhere in the written agreement. We have seen some refund and fee cancellation policies that refer to the student withdrawing before or after the term, semester or study period commences, without defining the length of the term, semester or study period in the refund or fee cancellation

policy or elsewhere in the written agreement. Similarly, we have seen cases where the provider's refund policy refers to a semester but the student is enrolled in a course that is divided into terms so the policy does not apply to that student's circumstances. These kinds of inconsistencies and confusing terms inevitably lead to disputes and often result in the provider having to pay a refund.

Finally, we note that while DE proposes to change the requirement for all education providers to be subject to the 50 per cent limit on the collection of tuition fees prior to the student commencing a course, it seems there may be scope for some high-risk providers to continue to be subject to this limitation. If this was the case and the limitation continued to rely on study periods to limit when the provider could request the remaining fees, then the study periods would need to be included in the written agreement.

Increasing flexibility in education delivery

We note the proposal to:

- Amend the National Code to increase flexibility and discretion in the use and allowable amount of online and distance learning, within visa requirements.
- Amend the National Code to broaden the work-based training or work-integrated learning provisions.
- Amend the National Code to allow course progress to be deemed by the relevant quality assurance agency as sufficient for meeting visa compliance requirements where appropriate.
- Amend the National Code to allow existing practices for monitoring attendance to be deemed to satisfy the requirements under the National Code where appropriate.

<u>Online and distance learning</u>

We note that this proposed change would have implications for attendance requirements and our office's consideration of unsatisfactory attendance external appeals. We do not have a view on the proposed change. However, we would need to know how a provider would be expected to monitor or not monitor attendance during online or distance education components of a course, for the purposes of assessing attendance external appeals.

<u>Work-based training/work-integrated learning</u>

We have investigated a number of complaints from overseas students who were required to complete a work-based training placement as part of their course requirements but complained their provider failed to organise the placement in a timely manner, requiring them to extend their Confirmation of Enrolment (CoE).

While we do not have a view on this proposed change, we note that providers who offer a course which includes a work-based training component need to be able to deliver on that offer. Otherwise it will result in provider default complaints and fee disputes. Providers also need to be careful that they comply with standard 1 – Marketing information and practices – when advertising that a student may elect to undertake a work-based training component. Again, the provider needs to be able to deliver on any such offer.

Attendance

We note standard 11 of the National Code currently allows providers to set their own level of satisfactory attendance above the minimum of 80 per cent. When we investigate external appeals relating to unsatisfactory attendance we already ask the provider to specify the level of attendance it requires for its overseas students.

If providers used their existing domestic attendance practices for overseas students we could request the provider's attendance policy when considering an appeal relating to unsatisfactory attendance for an overseas student and then consider the level of attendance required by that provider for both domestic and overseas students.

However, the provider would need to include in its attendance policy, specific advice for overseas students about the consequences of not meeting satisfactory attendance, which do not apply to domestic students, i.e. being reported to DIBP. In some complaints we have investigated where providers have one attendance policy for both domestic and international students, this has not always been clearly stated.

Course Progress

We note the proposal to allow quality assurance agencies to deem course progress as sufficient for meeting visa requirements - without the need for the provider to monitor and report on attendance - if the provider or course is considered suitable for this approach by the relevant registration agency.

We note higher education providers are already exempt from monitoring attendance under the National Code 2007. Similarly, the current DE-DIBP Course Progress Policy for Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) providers of Vocational Education and Training (VET) courses, exempts VET providers who adopt this policy from monitoring and reporting on attendance. We recognise the proposal to enable the quality assurance agency to make the decision about which providers and courses are exempt from attendance monitoring would give the regulators greater flexibility to adjust the attendance monitoring requirements according to risk.

We note VET providers who adopt the DE-DIBP Course Progress Policy currently indicate this in PRISMS. If the quality assurance agency deemed course progress as sufficient for meeting visa requirements for some providers or courses, would this also be reflected in PRISMS?

We also consider external appeals relating to unsatisfactory course progress where the provider has chosen to make attendance a component of course progress. This would mean providers who are not required to monitor attendance, but wish to do so for course progress purposes, would be able to do so as part of their course progress policy under standard 10 of the National Code.

We will continue to investigate external appeals from overseas students about unsatisfactory course progress or attendance under the proposed changes.

Transfer of students

We note the proposal to:

- Amend standard 3 of the National Code to more clearly require a written agreement to include a cancellation (currently refund) policy in the event of a student cancelling an enrolment or transferring to another educational institution, and;
- Amend the student transfer process in standard 7.
- Amend standard 4 of the National Code to require education institutions to enter into a written agreement with each education agent whose services it uses (as opposed to 'each education agent it engages to formally represent it');
- Support an industry driven shared set of principles or code of ethics for education agents. This may include consideration of an industry-led system for recognising formally trained, high-quality, ethical and suitably qualified or knowledgeable education agents (rather than a formal registration system)
- Support more options for training and informing education agents of their obligations to students.

Standard 3 and written agreements

We strongly support the proposal to require providers to include in their written agreement a cancellation fee policy, if the provider wishes to charge cancellation fees, in the event of a student cancelling an enrolment or transferring to another educational institution.

Some providers already include a cancellation fee policy in their written agreement. However, our complaint investigations show that many providers do not and instead incorrectly try to use their refund policy to require a student to pay further fees (when a refund policy can only cover refunding fees already paid, not charging additional fees as a cancellation fee for early withdrawal). In the complaints we have investigated we have had to recommend that many providers not pursue a student for cancellation fees because they lacked a cancellation fee policy in their written agreement to support this action.

Fee disputes and refund complaints are the most common source of complaints to the Overseas Students Ombudsman. On 21 July 2014, we released a Written Agreements Consultation Issues Paper, which described the problems we see with provider's written agreements. This includes the problem discussed above, of providers incorrectly trying to use a refund policy to charge students a cancellation fee.

It is important that providers who wish to charge cancellation fees have a cancellation fee policy in their written agreement, in addition to a refund policy. The refund policy should cover what amount, if any, will be repaid to the student, if the student withdraws or transfers to another provider. This is distinct from a *cancellation fee policy,* which states what *further or additional fees* the provider may charge a student, which they have not already paid, should they withdraw early or transfer to another provider.

However, in developing a cancellation fee policy, providers should not seek to rely on:

- cancellation fee terms that amount to a penalty, or
- terms that are unfair contract terms under s 23 of the Australian Consumer Law.

A penalty is a fee or charge that is 'extravagant and unconscionable' compared to the greatest loss that might conceivably flow from the breach or failure to comply with a particular stipulation in a contract instead of a genuine pre-estimate of loss.[2] Under this rule, a fee that is charged to secure the performance of a party to a contract must be a genuine pre-estimate of the loss suffered by the other party as a result of non-performance.[3]

Furthermore, a provider has a duty to take reasonable steps to mitigate any loss likely to be suffered by a student default. So, for example, if a student withdraws from a course well in advance of the course start date, the provider cannot simply leave the student's place vacant, and then claim that it has lost the whole of the tuition fees that the student would have paid for that place.

This duty to mitigate must be taken into account when considering whether a cancellation fee amounts to a penalty or a genuine pre-estimate of loss. Section 23 of the Australian Consumer Law provides that term will be unfair if, looking at the contract as a whole and the extent to which the term is transparent:

- it would cause a significant imbalance in the parties rights and obligations arising under the contract
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be disadvantaged by the term, and
- it would cause detriment (whether financial or otherwise) if it were to be applied or relied on.

A written agreement that attempts to lock students into a study pathway by failing to make any allowance for withdrawal with reasonable notice could be considered unconscionable. This is because such a clause may create an imbalance between the rights and obligations of the parties and providers would have less incentive to respond to any concerns or to complaints of 'locked in' students about quality issues.

The Baird Review of the ESOS Act in 2010 expressly recognised this problem in relation to refund policies and providers who were receiving 100 per cent of the course fees upfront and then refusing to refund any fees even if the student had withdrawn early from a long course:

> There are ongoing reports of providers who include in their written agreements refund provisions which would be considered by some unconscionable. For example, requiring students to pay the entire course fees even if the student withdraws after one study period, has been cited as a not uncommon practice. Withholding a student's fees for a study period where a student cancels their enrolment after teaching has begun may be a necessary business practice, but requiring full payment for the entire course appears to be taking advantage of a provider's strong negotiating position and a student's vulnerability. It might be wise for the Australian Government to expand the requirement for written agreements to specify the maximum amount of fees a provider can require upfront and keep if a student withdraws from a course of study.

[2] *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] UKLH1, *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656

[3] *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 and *Paciocco v Australia and New Zealand Banking Group Limited* [2014] FCA 35

Although these remarks were directed at the practice of requiring full upfront fees, they are also relevant to the imposition of excessive cancellation fees. Providers should be prohibited from including cancellation fee clauses in their written agreements, which make students liable for all unpaid tuition fees for future study periods, regardless of the circumstances of withdrawal or the notice given by the student.

On the other hand, providers do have legitimate interests to protect from unexpected student withdrawals. Providers have often invested heavily in recruiting students, including paying commissions to education agents, and may not be able to fill a place left vacant in a course by a student for some time.

In our view, a cancellation fee that equates to a genuine pre-estimate of the provider's actual loss is appropriate, provided a clear and transparent term about this is expressly included in the written agreement with the student. Therefore, we suggest that in amending standard 3, DE require that any exit fee included in a provider's written agreement should not exceed a reasonable estimate of the provider's actual financial loss.

Particular challenges can arise in applying these principles to refund policies and cancellation fee provisions in relation to packages of courses. For example, a written agreement may provide for a student to enrol and study first in an English language course, then a Foundation course, and then a Bachelor's course. Alternatively, the student may package an English language course followed by a certificate and a diploma course. In total, the tuition fees collected prior to commencement for packaged courses can run to tens of thousands of dollars, and relate to courses that may not be offered for several years into the future.

Often enrolment in the principal course is conditional upon successful completion of a subsequent course, such as an English language course. Written agreements are often silent about what happens to tuition fees already collected for the second or third course in a package if the student is unsuccessful in obtaining the required grades for the pre-requisite course. We have seen written agreements that provide that students are not entitled to any refund of prepaid fees, and are liable to pay cancellation fees if they withdraw, once they have commenced the first course in the package of courses.

On the face of it, the provisions described above may appear to be an attempt by providers to 'lock in' students financially to their courses, by penalising them if they withdraw, rather than genuine pre-estimates of the provider's actual loss, bearing in mind the provider's duty to mitigate that loss. In such cases, we expect a provider to be able to provide a detailed justification of the basis for its refund policy and any cancellation fees, so that we can be confident that it does not amount to a penalty or an unfair term under the Australian Consumer Law[4].

Recommendation
We recommend that DE take the Overseas Students Ombudsman's Written Agreements Consultation Issues Paper into account when amending standard 3 of the National Code to require a written agreement to include both a cancellation fee policy and a refund policy, to apply in the event of a student cancelling their enrolment or transferring to another educational institution. We also recommend that DE include a requirement that registered providers' refund and cancellation fee policies must not contain unfair contract terms within the meaning of the Australian Consumer Law and must not amount to a penalty.

[4] The Australian Consumer Law (ACL) is set out in Schedule 2 of the *Competition and Consumer Act 2010*. The provisions concerning unfair contract terms are dealt with in Part 2 of Chapter 2 of the ACL, ss 23-28.

Standard 7 and student transfers

In 2013-14, the second most common type of complaint to the Overseas Students Ombudsman was external appeals from overseas students who had been refused a release letter by their original provider under standard 7 of the National Code, preventing them from transferring to another provider, prior to completing six months of their principal course.

We are aware from our stakeholder engagement activities that this is a contentious issue. Providers wish to protect the investment they have made in recruiting overseas students, including Streamlined Visa Processing (SVP) providers who are also concerned that their SVP risk rating could be adversely affected if too many students withdraw. On the other hand, overseas students wish to exercise their rights as consumers to change courses if they choose to do so.

We find the administration of standard 7 is time consuming for providers, students and the Ombudsman's offices. We note that despite the time spent on disputes concerning transfer refusals, DE advises the transfer rates outside of the current restriction period are minimal. It seems sensible, therefore, to consider an alternative approach.

We note one option for amending the student transfer process in standard 7 could be to replace the requirement for a release letter with the requirement for providers to include in their written agreement a cancellation fee policy, should they wish to charge students an 'exit fee' for transferring to another provider. This would rely on the provision that the cancellation fee was equivalent to the actual financial loss suffered by the provider as a result of the student default. As noted in the discussion paper, this would allow providers to use their written agreements to articulate a cancellation fee policy that reflected the costs of the loss of that student.

However, we note the discussion paper does not state how the student transfer process may be amended. In this context, we would like to offer some observations on the problems we see with the administration of standard 7 by private registered providers.

The preamble to standard 7 states that, 'Registered providers, from whom the student is seeking to transfer, are responsible for assessing the student's request to transfer within this restricted period. It is expected that the student's request will be granted where the transfer will not be to the detriment of the student'. However, the preamble does not appear in the text of the explanatory guide, which most providers consult when considering the National Code standards.

In our experience, many providers overlook the preamble, and therefore fail to consider whether the transfer will be to the detriment of the student when deciding whether to approve a transfer request. We spend a lot of time having to explain this requirement to providers who have either not included it in their transfer policy or have not demonstrated in their refusal decision that the transfer will be to the student's detriment.

Similarly, we see transfer policies that state that the provider will only grant a release letter if the student can demonstrate exceptional circumstances to justify the transfer. This reverses the default position that transfers should be granted, unless it is to the student's detriment, and in our view, such policies are not compliant with standard 7.2.

The administration of standard 7 has also become more complex since DIBP introduced the Streamlined Visa Process (SVP) on 24 March 2012. Students who have been granted a visa to study with an SVP provider/s may or may not be in breach of their student visa condition if they transfer to another provider, depending on a range of factors including whether or not the:

- receiving provider is an SVP provider
- the course is in a different education sector
- student's country of passport is Assessment Level 1 for their current visa
- student has held their current student visa for at least 12 months[5]

This makes it difficult for students, providers and the Ombudsman's offices to determine whether a student's proposed transfer would put them in breach of their student visa condition and therefore be to their detriment. If an SVP provider states that they have refused a transfer on the basis that it would be to the student's detriment because it would put them in breach of their SVP visa, it is difficult for the Ombudsman's office to verify that this would actually be the case.

Similarly, if a provider does not raise an argument about detriment due to the SVP program and fails to demonstrate any other detriment, the Ombudsman's office may recommend the provider release the student. However, we would not want a situation where the Ombudsman recommended the provider approve the transfer but then DIBP subsequently found the student had breached their student visa condition by making the transfer and considered cancelling the student's visa.

It is important then that any changes to the transfer process under the ESOS Framework take into account DIBP's SVP policy. The relationship between standard 7 and the SVP arrangements should be very clearly articulated within the revised National Code.

Education agents

We support the proposal to require providers to enter into a written agreement with all education agents whose services it uses – not just those it formally engages to represent it.

We have investigated a number of complaints about the actions of education agents formally engaged to represent private registered providers. However, our jurisdiction is limited to 'action taken by a private registered education provider in connection with an overseas student, an intending overseas student, an accepted student, or a former accepted student' within the meaning of the ESOS Act'. In our view, this means we can only investigate the actions of an education agent if that agent has a written agreement with the private registered education provider. If, as proposed, education providers will be required to enter into written agreements with all education agents whose services it uses, this will provide our office with a greater ability to investigate complaints about education agents of private registered education providers.

We investigate such complaints with reference to standard 4 of the National Code and the terms of the provider's written agreement with the agent, including its processes for monitoring the actions of the agent and taking corrective action where required, which may or may not include termination of the agreement. The increase in written agreements between providers and education agents would therefore give us greater scope to investigate complaints about education agents. So too would an industry driven shared set of principles or code or ethics for education agents. We could investigate the actions of agents against such standards and hold private registered providers accountable for their

[5] http://www.immi.gov.au/Study/Pages/changing-courses.aspx Accessed 16 October 2014.

education agents' adherence to such standards. Support for more options for training and informing education agents of their obligations to students would also assist agents to understand their obligations and to comply with the ESOS framework.

Welfare of students aged under 18

We note the proposal to:

- Amend the National Code to clarify requirements and responsibility for the welfare of international students aged under 18 years, including clearer references to supervision, accommodation as 'adequate and appropriate', and health and well-being, and welfare arrangements.

We support this proposal. We encountered a provider which did not sufficiently understand the responsibility it had taken on under standard 5 of the National Code to ensure adequate and appropriate welfare and accommodation arrangements for an under 18 year old student who was depressed, had stopped attending school and was living in a homestay arrangement that had not been checked by the school. In our view, strengthening and clarifying the requirements and responsibilities for international students under 18 years would help to better protect such students.

We also recommend that DE give greater guidance to education providers regarding legal guardianship for overseas students aged under 18 years. Standard 3.1 requires that if the student is aged under 18 years the student's parent or legal guardian must sign or otherwise accept the written agreement. However, we have found through our complaint investigations that some providers do not understand the requirements of legal guardianship and think a homestay parent or relative is a legal guardian.

For example, we have seen some providers accept the signature of a homestay parent or relative on the written agreement, when the homestay parent or relative is not the child's legal guardian. Furthermore, we have seen one provider purport to give the homestay parent the authority to make decisions about medical treatment for an under 18 year old student when they were not the child's legal guardian and therefore had no legal authority to do so.

Education providers may also assume that a relative holding a subclass 580 Student Guardian Visa to care for an under 18 year old overseas student is that student's legal guardian. Indeed, DIBP's website[6] states:

> this visa allows you to stay in Australia **as the guardian** of an international student younger than 18 years of age studying on a student visa. (our bold)

However, the website also states that a relative (who is not also the legal guardian) may be able to get this visa:

> Requirements
> You might be able to get this visa if you:
>
> - are a parent or person who has legal custody of the student, **or a relative who is nominated by** a parent or custodian of the student (our bold)
> - are at least 21 years of age
> - have no family members younger than 6 years of age, except under certain circumstances
> - are able to provide accommodation, general welfare and other support to the student.

[6] www.immi.gov.au/Visas/Pages/580.aspx Accessed 16 October 2014.

Further, the DIBP website[7] refers to a 'legal custodian' when explaining student visa condition 8532:

> If you have not turned 18 you must maintain adequate arrangements for your accommodation, support and general welfare for the duration of your stay in Australia.
>
> To maintain adequate arrangements for welfare you must stay in Australia with:
>
> - your parent or **legal custodian**
>   or
> - a relative who has been nominated by your parents or custodians who is aged over 21 and is of good character
>   or
> - accommodation, support and general welfare arrangements that have been approved by your education provider.

However, it is not clear if a 'legal custodian' is equivalent to a 'legal guardian', which is the term used in standards 3.1 and 7.3 of the National Code.

This highlights the need for greater guidance for education providers about what constitutes a legal guardian – both for the purposes of signing a written agreement for an under 18 year old and for confirming support for a transfer between providers under standard 7.3 of the National Code. Providers also need greater guidance on how this may differ from who can take responsibility for the accommodation and welfare arrangements for an overseas student aged under 18.

Working with stakeholders to produce a practical and accessible National Code and explanatory guide for ESOS

We welcome the opportunity to have input into the revision of the National Code and associated explanatory guide. We use the National Code standards to guide the decisions we make in investigating overseas student complaints and the recommendations we make to providers. The National Code provides an important reference point for the actions of education providers and their education agents and what it is acceptable or not.

We note the proposal to:

- Remove redundant provisions in the National Code.
- Develop a simpler and clearer explanatory guide and other supporting material for ESOS, in collaboration with stakeholders, with sector-specific examples.
- Amend the ESOS Act to better reflect the purpose of the National Code, its contents and the changes proposed in this discussion paper.

We support these proposals and would welcome the opportunity to include information on the role of the Overseas Students Ombudsman as an independent, external complaints and appeals body for *private* education providers and their overseas students. References could also be included by the State and Territory Ombudsman's offices about their role in providing independent, external complaints and appeals bodies for *public* education providers and overseas students in each state and territory, as well as the Office of the Training Advocate providing such services for overseas students with public or private providers in South Australia.

[7] http://www.immi.gov.au/students/visa-conditions-students.htm Accessed 23 October 2014.